FOR ARGUMENT

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

—VS.—

CITY OF TIBURON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* ON BEHALF OF THE COMMITTEE ON ENVIRONMENTAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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This Brief *amicus curiae* on the merits of this appeal is filed by the Committee on Environmental Law of the Association of the Bar of the City of New York pursuant to Rule 42 of the Rules of the United States Supreme Court. Both appellants and appellee have consented to the filing of this brief and copies of their consents have been filed with the Clerk of this Court.

Interests of *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of 11,766 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State

Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

Much of The Association's membership serves on specialized committees which are designed to make professional contributions in their special fields in furtherance of The Association's purposes. The Association's Committee on Environmental Law ("Committee") has examined the issue on appeal herein; it requested and unanimously approved the preparation of this brief *amicus curiae*. The Committee is composed of eighteen attorneys with extensive experience in environmental law and land-use gained through serving in local, state and federal governments, representing corporations, real estate development interests, environmental citizen organizations, and a range of other interests. The Executive Committee of The Association has authorized the filing of this brief on behalf of The Committee.

The Committee is concerned that the severe, narrow view advanced by appellants here, that each land-use regulation which exceeds constitutional limits creates a cause of action for damages, if adopted, would seriously inhibit land-use regulation in New York and nationally. We maintain that current legal practice in this sensitive area has struck a reasonable balance between the need to protect owners' interests and the need to safeguard the community from abusive land-use which ultimately erodes those property values. This is a responsibilty as time-honored as the common law of nuisance from which it stems. This balance is in conformity with the Constitution and has proven to be equitable. The predictability of the law is relied upon by municipalities, real estate developers

and environmental protection interests. To impose the threat of huge damages on municipalities would chill the exercise of their responsibility in this vital area of land-use regulation. There is no sound reason for reversing the decision of the California Supreme Court below. The administration of land-use laws in New York and elsewhere, as well as the economy, would be disrupted by a contrary decision which would throw the law into turmoil.

ARGUMENT

POINT I

Dismissal Was Warranted And No Trial Is Needed On The Issue Of Damages Because The State Court Properly Ruled That There Was No Taking.

The apparent linchpin of appellants' claim is their conclusory allegation that the ordinance "has completely destroyed the value of Plaintiffs' property for any purpose whatsoever . . ." (Complaint, ¶ IX). That allegation ignored the fact that appellants were free, under the very ordinance they attack, to construct five single-family residences on their five-acre tract. Accordingly, the California courts correctly found that they were not deprived of the reasonable use of their property. Thus, the state courts found that there was no cause of action for damages to be tried because there was no taking but merely an exercise of the State's police power.

Since on its face appellants' complaint failed to assert the sort of invasion or severe deprivation of all reasonable use which alone might support a taking claim, there is no issue of fact to try.

Portsmouth Harbor L. & H. Co. v. United States, 260 U.S. 327, on which appellants rely, dealt with a private

resort hotel made totally unusable by naval artillery shells being fired directly over it—a classic taking, in contrast to the zoning regulation at bar which does no more than reduce somewhat the value of appellants' tract. To rule that a compensable taking would undo *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, and five decades of municipal land-use controls since, leaving the law in chaos.

Appellants disingenuously assume that local governments would actually prefer the damage suits and potential liability their view would spawn to the time-honored remedy of judgment declaring an ordinance unlawful. In the first place the two are not exclusive. Appellants themselves sought both. Landowners aggrieved by restrictions are plainly not going to abstain from challenging their constitutionality, even if damages exist as an alternative.

Further, appellants turn the precedents on their head in arguing that invalidation of a statute is somehow more extreme or onerous to states and localities than the barrage of actions for damages their view of the law would unleash. The cases holding damages the proper remedy rather than derailment of a government program dealt with clearly compensable takings—the flooding of private property in *Hurley v. Kincaid*, 285 U.S. 95, or its actual seizure in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102. Compensation for the owners was a genuine consideration there, and the government program was an actual taking. Here, in sharp contrast, the ordinance simply regulates the extent to which appellants may build on their land. Their ritual invocation of their property rights gives them no justification whatever to raid the public treasury when those rights are controlled by an ordinance found to be valid by the state courts closest to the scene.

Appellants would have us believe invalidating a state or local law—a remedy they correctly note is to be sparingly applied (Br. p. 38)—is somehow more burdensome to state and local government than imposing monetary damages would be. It is not appellees who seek to change the law or encourage litigation (Appellants' Br. p. 39) but rather appellants, who would have this Court create a remedy in damages for those restricted by traditional municipal land-use controls which would shift the focus of the courts to complex damage suits, often requiring jury trials.

Later in their brief, appellants appear to concede (Br. p. 41) what they earlier disputed—that the damage claims they seek to pursue would hobble local governments far more than existing remedies. They laud the "deterrent effect" (p. 41, n.20) of damages on public officials. But aside from the chill the threat of such suits would doubtless place on all but the mildest land-use controls, whatever possible punitive value such actions might serve does not remotely warrant the radical tampering with constitutional principles appellants urge.

The radical nature of appellants' proposal is borne out by this Court's consistent refusal to find a compensable taking in case after case involving land-use controls far more stringent than those at bar, where appellants remain free to build up to five homes for resale on their five-acre tract. Not only in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, but in *Miller v. Schoene*, 276 U.S. 272, and *Goldblatt v. Town of Hempstead*, 369 U.S. 590, this Court rejected claims such as those here advanced. Most recently, this Court rejected the taking claim in *Andrus v. Allard*, ... U.S. ..., 100 S.Ct. 318, involving severe restrictions on personalty. Even in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, relied on repeatedly by appellants, the plaintiff recovered no damages. And although, as appellants note, the state was not a party to that suit, that was by the plaintiff company's choice.

This Court has consistently respected the traditional responsibility and upheld the rights of local governments to regulate the use of land within the community even when highly respected values are assertedly infringed. See *Village of Belle Terre v. Boraas*, 416 U.S. 1; *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50. Here, where no free-speech or right-to-travel claims exist, it would be an unjustified departure from settled constitutional principles to corrode so severely the right of the locality to control the use of land within its borders.

POINT II

The Radical Change In The Established Remedies For Unconstitutional Land Use Regulation Advanced By Appellants Would Disrupt Stable Economic Expectations And Frustrate Accepted Patterns Of Zoning And Local Government Police Power Responsibilities.

Appellants' attack is really aimed at zoning itself. By creating a compensable taking when zoning exceeds constitutional limits, it would subvert the structure of land-use controls which our federal system property reserves to the States and their political subdivisions. *Village of Belle Terre v. Boraas, supra; Village of Euclid v. Ambler Realty Co., supra.* Thus, controls of such critical matters as land-use regulation for "sanitation, public health, and parks and recreation" are "traditional government functions of the several states." *National League of Cities v. Usery*, 426 U.S. 833 at 851, n.16.

In recognition of the principal state and local responsibility for controlling land-use, federal environmental laws have authorized delegation of many of their powers to the States, *e.g.*, water pollution permits (Clean Water Act § 402, 33 U.S.C. § 1342), safe drinking water controls (Safe Drinking Water Act, 42 U.S.C. § 1421), air emis-

sion controls (Clean Air Act § 110(a)(2), 42 U.S.C. § 7410), and flood plain management (National Flood Insurance Act § 1361, 42 U.S.C. § 4102). While Congress has explicitly found the federal interests in these environmental land-use controls important, the Tenth Amendment secures State authority and insures that "the states retain broad discretion under the[se] regulations to control the use of their land in the scope of economic development." *Sierra Club v. E.P.A.*, 540 F.2d 1114, 1140 (D.C. Cir. 1976). This Court has recognized the state role in such critical land-use issues as housing equity, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252.

In the half century since *Euclid*, a stable pattern of state and local land-use regulation has emerged. It is locally implemented under state enabling laws so as to be flexible and responsive to a region's policies for economic growth, maintenance of environmental quality, and energy resource management, as well as responsive to local needs and priorities. See, *e.g.*, Daniel R. Mandelker, *Environmental and Land Controls Legislation* (1976).

Nationally, a flexible and varied pattern of zoning has emerged. Indeed, a locality can even use its zoning authority to create the effective basis for real estate development, as New York City has done with its Zoning Resolution and its Landmarks and Historic Districts Law, upheld by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104. New York's Zoning Resolution establishes the perimeter of commercial development. Flexibility is provided in three ways: (1) variance procedures are available through the New York City Board of Standards and Appeals, a typical zoning appeals mechanism; (2) legislative changes are entertained through the City's planning commission; and (3) assessment and valuation disputes are adjusted through the City Tax Commission. The same elements, rather more simple

in structure, are found in the villages and towns around New York State. New York State has fashioned similar methods to deal with case-by-case adjustments needed as a result of state land-use regulation, such as the Freshwater Wetlands Appeals Board. Environmental Conservation Law Art. 24, Title II. The courts may be called upon in lieu of these administrative routes when an overly restrictive law must be set aside as unconstitutional. *Fred F. French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 350 N.E.2d 381 (1976), *app. dism.* 429 U.S. 990.

New York City's zoning has even created value in the space "adrift" above a site, and allowed its transfer as a development right to another site. New York City Zoning Regulation, §§ 74-79 to 74-79.3. The utility of adjusting value in the context of setting development limitations on land has been established by scholars, *e.g.*, John J. Costonis, *Space Adrift* (1974), and was recognized by this Court in *Penn Central Transp. Co. v. City of New York, supra.*

What appellants would have this Court do is construct an inverse condemnation remedy to create a cause of action in damages for the difference between "free market value" and market value as regulated. To do so would disrupt the entire *Euclidian* pattern of land-use. Such a step would destroy the expectation of real estate developers, park managers, conservation interests, municipal planning boards, and landowners themselves. Consider the range of consequences such a disruption would involve:

How would the air rights over a site be measured? Such a gloss on the Fifth Amendment's "taking" provision would enmesh the federal courts in explaining what the appropriate measures of value are, in the absence of "comparable" cases. Until the comparables were found and a new set of patterns settled, there would be economic and regulatory chaos. Predictability would be lost.

Consider situations where land is actually confiscated to extend a public works project. Where the extension was originally in the plans, the land taken is compensated for at market value before the adjacent project was built; where the extension was a new idea, the compensation is based on the value of the site taken as increased in amount because of the adjacent projects being built. *United States v. Miller*, 317 U.S. 369; see "Eminent Domain—Enhanced Value of Property", 95 A.L.R. 3d 752 (1979). Should the need to compensate be extended to unconstitutionally restrictive zoning, as appellants urge, would some landowners be denied the windfall social increment of value which public works projects might bring them?

Should the owner's "highest and best use" in the market value sense, unfettered by any land-use regulation or public works like roads or nearby parks, fix the value of the parcel? Or should the taking be computed from the maximum constitutional regulation the state might have adopted? Dealing with these questions could open a Pandora's box for the deferal courts.

Development "value" is a creature of what the zoning laws will permit. That is the teaching of *Euclid v. Ambler*, Appellants seek to undercut this system by having this Court order that some Platonic ideal of free market value offers an outside limit of value which the owner is entitled to possess as a right of his ownership—abandoning *Euclid v. Ambler* and regressing to an anachronistic notion of total ownership, with the owner holding almost all the proverbial bundle of sticks and the community and its government nearly none. Their scheme would enmesh the federal courts first in drawing a factual line as between the outer limit of theoretically constitutional development and unconstitutional restrictions, and second in fixing a value for that potential difference in development intensity. Aside from what this would do to federalism, courts are ill-equipped to give advisory opinions as to which de-

velopment scheme is realistically the "highest and best use" of a parcel. That entails the skills of an entrepreneur, the uncertainties of financing and marketing, and the finely-tuned legislative judgment of a zoning enactment.

What would happen, for instance, if appellants obtained their inverse condemnation damages "award" and the City of Tiburon were then to repeal its zoning ordinance and allow high density garden apartments on the site? Would they have to pay back, *pro rata*, the damage award? Just as this Court awarded no compensation when it overturned a statute barring child labor on long-since rejected substantive due process grounds, *Lochner v. N.Y.*, 198 U.S. 45, so none is required when the police power in a land-use context is used to secure a common public value. The Agins have not, after all, as we have noted, been denied the right to develop their site.

What would happen if Tiburon decided to tax and recapture any enhanced value which its adjacent public works projects or its zoning controls bring to a parcel? Might not such a tax eliminate the "windfall" not be a fair and valid way to finance compensation for zoning "wipe-outs" in a given city? Cf. Hagman and Misczynski, *Windfalls For Wipeouts* (1978); D.G. Hagman, "Compensable Regulation: A Way of Dealing With Wipeouts From Land-Use Controls," 54 U. of Detroit J. Urb. L. 45 (1976). Such a use of state or local real property taxation is invited by the Agins' proposal. If such taxation began, it would have a far more stifling effect on real estate development than do the current zoning and environmental land-use controls. Why should this Court play the activist role appellants demand of it in promoting such a change in state laws for real property use and taxation?

There has been no physical invasion of the Agins' property by Tiburon. No traditional use of the land has

been taken; "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim." *Andrus v. Allard*, ... U.S. ..., 100 S.Ct. 318, ...

POINT III

New York Has An Effective Land-Use Regulation Scheme Which Appellants' View Would Undermine.

Appellants' jurisdictional statement contended New York's law in this area was unclear. This is inaccurate, and in fact the evolution of the law in New York effectively shows how the states may best furnish a remedy in land-use cases in which a taking is claimed. New York's Court of Appeals held in *Fred F. French Investing Co. v. City of New York, supra*, 39 N.Y.2d 587, 350 N.E.2d 381, app. dism. 429 U.S. 990, that a clearly constitutional zoning change creating a special park district which deprived the owner of the use of the tract did not constitute a compensable taking. New York limits such takings, in "all but exceptional cases" (*Fred F. French v. City of New York, supra*, 39 N.Y.2d at 593, 350 N.E.2d at 385), to acts of government "in its enterprise capacity, where it takes unto itself private resources in use for the common good." *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 128, 316 N.E.2d 305, 310 (1974).

Recently in *Matter of Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304 (1979), New York clarified its rule, holding, in a proceeding to review a state agency's denial of a permit to place fill in a protected wetlands area, that "only when the evidence shows that the economic value, or all but a bare residue of the value, of the parcel has been destroyed has a 'taking' been established ***." 48 N.Y.2d at 263, 397 N.E.2d at 1308. The court went on to rule that an aggrieved landowner asserting facts which actually support a taking claim—unlike appellants here—has a right to a trial on that issue.

The California courts properly held the factual assertions at bar do not justify such a trial, since, in contrast to *Spears*, the ordinance concededly permits applicants to erect five homes on their five-acre parcel. What is significant here is that New York furnishes a remedy for an aggrieved landowner under a balanced scheme which adopting applicants' radical view of the Fifth Amendment would jeopardize.

Spears v. Berle upheld a state law protecting freshwater wetland areas from overdevelopment. New York Environmental Conservation Law, Art. 24. Similar New York statutes protect tidal westlands, needed as a breeding ground for fish and shellfish, Environmental Conservation Law, Art. 25, as well as the Adirondack region, where the legislature has found overdevelopment would destroy scenic and recreational values. New York Executive Law, Art. 27. All such statutes, as well as historic landmark laws (*Penn Central Transp. Co. v. City of New York, supra*) and zoning ordinances, would be placed in jeopardy by a decision allowing damage suits where the legislation is found to exceed constitutional limits. Ironically, much of this legislation, notably historic district laws and zoning itself, benefits individual landowners as well as the community by augmenting the value of an entire area. Appellants, who write as if self-appointed crusaders for all landowners, are in fact betting with the shirts of numerous owners of property whose investments would be destroyed were these laws impaired.

Foster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893), which appellants describe as "seminal" (Br. p. 29), has nothing to do with this case. There the court properly set aside an 1882 law purporting to deny compensation to a certain landowner whose property was literally taken by the municipality for a street. The zoning and other land-use laws at which appellants tilt did not then even exist.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed in all respects, or in the alternative, the appeal dismissed for want of a substantial federal question.

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Respectfully submitted,

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